No. 96-455 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDWIN DEJESUS, indivdually and on behalf of all others similarly situated, CAROLYN PENZO, RICHARD C. LARKIN, WILLIAM M. COOKE, and RANDY J. LANE,

Petitioners,

—v.—

SEARS, ROEBUCK & CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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13 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

Cases PAGE

American Protein Corp. v. AB Volvo, 844 F.2d 56 (2d Cir.), *cert. denied*, 488 U.S. 852 (1988)..... 9

Butts v. Commissioner of Internal Revenue, 49 F.3d 713 (6th Cir. 1995)..... 6

Everhart v. United Financing Co., 1980-81, Trade Cas. (CCH) Par. 63,788 (N.D. Ohio 1980)..... 4

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983)..... 9

49er Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463 (9th Cir. 1986) 5

Goldinger v. Boron Oil Co., 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd*, 511 F.2d 1393 (3d Cir.), *cert. denied*, 423 U.S. 834 (1975) 5

Hand v. Central Transport, Inc., 779 F.2d 8 (6th Cir. 1985)..... 3

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 2, 4, 9

Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F.2d 265 (2d Cir. 1929)..... 8

United Farmers Agents v. Farmers Insurance Exchange, 89 F.3d 233 (5th Cir. 1996) 6

Waldo v. North American Van Lines, Inc., 669 F. Supp. 722 (W.D. Pa. 1987) 4

Statutes

Sherman Anti-Trust Act.....*passim*

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I. INTRODUCTION

Respondent Sears' Brief in Opposition ("SBO") contains statements and arguments requiring a reply. We reply to them in the order in which they were made.

II. ARGUMENT

1. By describing the NOAs' claim that Sears violated the Sherman Act as a mere "objection to a job requirement" (SBO

2) or an "employment grievance" (SBO 3 n.*), Sears seeks to trivialize it. In so doing, it would have this Court ignore the fact, for example, that the NOAs alleged that Sears used its undoubted and unfettered power over electronic access to its database and over the NOAs' livelihoods to coerce some 10,000 of them to lease computers from it indefinitely rather than to purchase them for a far less total cost on the open market, thus victimizing not only the NOAs but also Sears' competitors in the computer field, who lost millions of dollars in sales by virtue of Sears' coercive tactics.

2. In arguing that a "tying" claim must involve a "product" that has to be "sold" as a "fundamental, definitional matter" (SBO 2, 3 n.*), Sears reveals the weakness of its argument and of the holding of the court below. Its position is inconsistent with the broad view of this Court in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 21 n.34 (1984). Just as the Sherman Act does not mention "tying," it contains no requirement that there be a *tangible* "tying product" or that the "tying product" be sold.

3. Sears' apparent position that the Sherman Act requires a tangible "product" is inconsistent with its own position on the application of the Sherman Act to franchise cases. Conceding (SBO 4), as it must, that Sherman Act violations have been found in "franchisor requirements that their franchisees buy certain products directly from the franchisor," Sears contends that the tying "product" is the franchise itself. If the necessary "product" can be defined so broadly as to include the intangible right or privilege which constitutes a franchise, it can easily accommodate "employment" or a contractual arrangement with independent contractors such as Sears has with its NOAs.

Put another way, a franchisor who requires a franchisee to purchase incidental products directly from the franchisor, or risk losing the franchise, violates the Sherman Act. Here, through Allstate, Sears required the NOAs to lease computers

from it at the risk of losing their livelihood as NOAs. Sears has shown no valid reason why the Sherman Act should view these two strikingly similar situations differently, making fish of one and fowl of the other. No such reason exists, especially in light of *Jefferson Parish*.

4. Sears argues (SBO 2) that the NOAs' complaint was properly dismissed because it did not charge that Sears or Allstate had monopoly or market power in a "product." Once again, it erroneously assumes that a *tangible* "product" is required, and contradicts its position with respect to the franchise cases. Furthermore, the NOAs sufficiently alleged (Third Amended Complaint ["TAC"] Pars. 11, 20[b]) that Sears had market power over access to its database and that the NOAs who, through Allstate, were contractually bound to it, needed electronic access to that database in order to perform their duties properly.

5. In arguing (SBO 3) that the Second Circuit's holding that employment cannot be a "tying product" is not in conflict with *Hand v. Central Transport, Inc.*, 779 F.2d 8 (6th Cir. 1985), Sears claims that "it is not even clear from the cryptic opinion in *Hand* whether the plaintiff in that case even claimed employment as a tying product" and that the Fifth Circuit never so held. *Hand* itself, however, states, at p. 9, that the plaintiff's complaint had alleged that the defendants (collectively referred to as "Mohawk") "violated the anti-trust laws by 'tying' the financing of tractor-trailer trucks with the acceptance of Mohawk's offer of employment." It is further stated, at p. 10, that the plaintiff claimed that "Mohawk impressed upon him that his employment as an owner-operator was conditioned upon financing the tractor with Mohawk." Moreover, had not the Fifth Circuit at least implicitly held that such employment could be a tying "product," it would have summarily affirmed on that ground alone, as did the Second Circuit here.

6. The statement (SBO 3 n.*) that the NOAs "suggest that their claim should be considered as something other than a tying claim" is not so. They have made a tying claim, but without the gloss put on it by those, such as Sears, who would require a tangible "product," and other features such as "linear movement" and the like. That gloss was removed by this Court in *Jefferson Parish*.

7. Sears' claim (SBO 4 n.*) that "federal courts have . . . repeatedly rejected efforts to treat employment as a tying product" is not borne out by the cases cited in support of it.

Sears' citation of *Waldo v. North American Van Lines, Inc.*, 669 F. Supp. 722 (W.D. Pa. 1987) misses the mark, since it refers to a tying claim in *Waldo* of the sort the NOAs never made and ignores a tying claim in *Waldo* of a sort they *do* make. In dealing with Waldo's claim that his ability to obtain a tractor from NAVL was tied to his willingness to obtain insurance from it, the court stated, at 727-29, that:

> Proof of a tying arrangement can be established either by reference to an express contractual provision or by showing that the plaintiff was coerced into accepting the tied item. . . . Here, there is nothing in the Truckman's Agreement or the Contractor Operating Agreement which directly or indirectly requires owner/operators to purchase insurance specifically and solely through NAVL.
>
> * * *
>
> Our review of this evidence convinces us that plaintiff has failed to produce proof of coercion. . . . By admitting that he was aware of his option to purchase insurance elsewhere, plaintiff has defeated the very essence of his illegal tying claim.

That is clearly not this case.

Everhart v. United Financing Co., 1980-81, Trade Cas. (CCH) ¶63,788 (N.D. Ohio 1980) does not support Sears'

position. There, for example—unlike here—the plaintiffs were *not* required to pay such substantial expenses as rent, or sign a lease for the premises and, indeed, had "no financial risks whatsoever" in their relationship with the defendant. The element of coercion was lacking.

Goldinger v. Boron Oil Co., 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd*, 511 F.2d 1393 (3d Cir.), *cert. denied*, 423 U.S. 834 (1975) does not support the proposition for which it was cited. Indeed, at 404, in explaining its rejection of a tying claim, the court stated that:

> There is nothing in the evidentiary material including plaintiff's own deposition to show that he ever purchased or was required to purchase any product from the defendant. . . .

Here, however, it is clearly alleged that the NOAs were required to lease computers from Sears and pay fees to Woodward Direct, a company controlled by Sears.

Sears' citation of *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463 (9th Cir. 1986) is surprising. The case is not at all in point on its facts, but is very much in point in its statement of the law. It stated at 1469, for example, that:

> The Supreme Court has indicated that the legality of any particular arrangement depends not on whether the challenged conduct can be labeled "tying," but rather on its competitive effects. See *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 1563, nn. 33 & 34, 80 L.Ed.2d 2 (1984). Because the dealers in this case failed to make an adequate showing of harmful anticompetitive effects resulting from the existing warranty payment arrangements, we conclude that the district court properly held that these arrangements do not violate the antitrust laws.

The anti-competitive effects in this case are more than obvious. Some 10,000 NOAs were required, for example, to lease from

Sears a computer which they could have obtained from any one of Sears' many competitors in the computer field.

8. The inconsistencies in Sears' position (and in that of the court below) are exemplified by its treatment (SBO 4-5) of the franchise cases upon which the NOAs relied at pp. 6-7 of the petition. Forced to recognize that Sherman Act violations have been found in "franchisor requirements that their franchisees buy certain products directly from the franchisor," Sears' recourse is to distinguish franchise cases from this one by referring to NOAs as "employees," rather than as the independent contractors they were held to be in *Butts v. Commissioner of Internal Revenue*, 49 F.3d 713 (6th Cir. 1995)—a case with which Sears chooses not to deal. Even if the NOAs were mere employees, their claim would be a valid one. But they are independent contractors with as much right to be shielded from "tying" as are franchisees who are forced to buy incidental items directly from their franchisor.

9. Sears (SBO 5-6) describes the Second Circuit's opinion as holding that where a database such as Allstate's is made available without charge to the NOAs as an "attribute of . . . [their] employment, it cannot be deemed a 'tying product' for antitrust purposes." Such reasoning begs the question: the database was *not* made available to the NOAs without charge. The NOAs had to pay for it through a costly and indefinite lease from Sears itself of a computer more cheaply available by purchase on the open market. To say that Sears provided the database to the NOAs "without charge" is to ignore reality and to play with words. A throat-parched desert-wanderer who is offered ice water "without charge" provided that he pay fifty dollars for the plastic cup into which the water will be poured—the wanderer not being allowed to use his own cup—can be excused for believing that he did not receive the water "without charge." Sears, it seems, would dispute this.

10. In claiming (SBO 7) that the Fifth Circuit's decision in *United Farmers Agents v. Farmers Insurance Exchange*, 89

F.3d 233 (5th Cir. 1996) supports its position that the NOAs' claim—facially similar to that of the plaintiffs there—is "not a valid claim under the antitrust laws," Sears ignores the signifi cant differences between the facts of the two cases. The Fifth Circuit relied heavily on facts not present here and upon the absence of facts which the NOAs' complaint alleged they would prove, but were never given the opportunity so to do. For example:

a. A Farmers' agent could use another agent's computer to access the electronic database (89 F.3d at 235), but a NOA was not allowed to do so (TAC ¶ 20[b]);

b. Farmers Insurance did not sell electronic access to its database or sell computers (89 F.2d at 236), but Sears does sell or lease computers and, through Allstate, required NOAs to buy electronic access to the database by the indefinite lease of one of its computers;

c. The Farmers' agents, though granted ample discovery, were unable to show that other computers of comparable quality were available elsewhere at less cost (89 F.3d at 237), but the NOAs alleged that they could make such a showing[1] (TAC ¶¶ 20[b], 32);

d. The Farmers' agent had available to him or her manual access to policy information which was "a good substitute for electronic access" (89 F.3d at 238), but the NOAs alleged that *computer* access to the database was "necessary for the proper performance of the NOA's work" (TAC ¶¶ 20[b] and 32);

e. A Farmers' agent "unhappy with Farmers' computer policy," was free to move to a new company "without incurring any significant cost" (89 F.3d at 238-39), but the NOA was not so free, since his contract required him, for example, to be *personally* responsible for even long-term office leases (TAC ¶¶ 17, 72[g], 73). Such leases are not easily broken.

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[1] A Farmers' agent was allowed to *purchase* a computer (89 F.3d at 235); Sears caused 10,000 NOAs to be saddled with *indefinite leases*.

The Fifth Circuit's opinion in *United Farmers*, we submit, supports our position. If it had had the NOAs' complaint before it, the outcome would surely have been different.

11. Sears' argument (SBO 8 n.*) that the complaint was invalid because it failed to allege that the NOAs were *required* to use Woodward Direct, only that they were *required* to do so if they *wished* to advertise in the Yellow Pages is erroneous. Sears claims that it was essential to allege that it had forced the NOAs "into the purchase of a tied product." This the complaint surely did. It was alleged that if the NOAs wished to advertise in the Yellow pages, they *had* to do so through Woodward Direct. That, we submit, is all that is required to state a valid tying claim.

12. Sears' reliance upon the "corporate veil" doctrine (SBO 7) is misplaced. The complaint clearly alleges (TAC ¶ 30) that Sears caused Allstate to require the 10,000 NOAs to lease Sears-owned computers in order to access the database essential to their livelihoods and to obtain desirable Yellow Pages advertising solely through a Sears-owned agency. These coercive tactics profited Sears, rather than Allstate, to the tune of millions of dollars. The complaint can surely "fairly be read to allege independent action on the part of" Sears. Here, the entire thrust of the complaint was that Sears, for its own benefit, was an active wrongdoer using Allstate as its agent. As Judge Learned Hand noted in *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929):

> One corporation may . . . become an actor in a given transaction . . . and when it has, will be legally responsible.

That is the principle upon which the complaint relied, and its allegations of Sears' active wrongdoing supported that reliance.

Even if the complaint had sought to pierce the corporate veil, Sears errs in its attack upon it. Whether a piercing of the corporate veil is appropriate in a given case is generally a fact

question which should be submitted to a jury. See *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 59 (2d Cir.), *cert. denied*, 488 U.S. 852 (1988) ("[T]he issue of corporate disregard is generally submitted to the jury.").

The counts improperly dismissed were brought under federal remedial statutes—the Sherman and Clayton Acts. The "corporate veil" is not so sturdy in such cases. In *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983), for example, this Court stated that it had "consistently refused to give effect to corporate form where it is interposed to defeat legislative policies."

13. Finally, we are at a loss to understand Sears' argument (SBO 7) that the petition should be denied because the complaint failed to allege that Sears had "appreciable economic power in the tying market." First, if such a specific allegation were essential to the complaint and, if present, would have saved it, the Second Circuit would have permitted an amendment. Most important, however, is the fact that, fairly read, the complaint alleged that Sears, through its agent Allstate, had complete power over electronic access to the database which the NOAs—contractually bound to Allstate—needed to perform their duties and that, in the words of *Jefferson Parish*, 466 U.S. at 12, Sears was guilty of:

> exploitation of its control over the tying product [i.e., the database] to force the buyer into the purchase [here, the indefinite lease] of a tied product [i.e., a Sears-owned computer] that the buyer . . . preferred to purchase elsewhere on different terms.

This illegal "forcing," which violated the Sherman Act, was properly alleged.

III. CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment of the Second Circuit in this case should be reviewed.

Respectfully submitted,

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